

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
SY ASSOCIATES	:	DETERMINATION
	:	DTA NO. 811389
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

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Petitioner, Sy Associates, c/o Marks, Shron & Company, 111 Great Neck Road, Great Neck, New York 11021, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on September 3, 1993 at 9:15 A.M. Petitioner submitted its brief on January 10, 1994. The Division of Taxation filed its brief on February 4, 1994 and petitioner was to file its reply brief on or before February 17, 1994. Petitioner appeared by Gordon I. Remer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether petitioner timely filed a request for a conciliation conference before the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

On February 26, 1992, petitioner, Sy Associates, as claimant, filed a Claim for Refund of Real Property Transfer Gains Tax, Form TP-165.8, in the amount of \$383,255.00. The basis of the claim was that the Division of Taxation ("Division") erroneously disallowed capital improvement costs incurred in connection with the development of the property for the construction of a new facility.

On the claim for refund form, the "Address of claimant" was listed as:

c/o Marks Shron & Company  
111 Great Neck Road  
Great Neck, New York 11021

The "Name and telephone number of person to contact" was indicated as:

Arnold A. Gruber  
(516) 466-6550

The Division issued, on March 18, 1992, a letter denying the refund claim. This letter was addressed to:

Arnold A. Gruber  
c/o Marks Shron and Company  
111 Great Neck Road  
Great Neck, New York 11021

The letter stated that development costs could only be allowed when incurred in connection with the actual physical improvement of the property. Since no capital improvements were made to the property in the subject transfer, the costs in question could not be allowed.

Accordingly, the refund claim of Sy Associates was denied in its entirety. The letter concluded by stating that:

"In accordance with Section 1445.2 of the Tax Law, this determination shall be final and irrevocable unless claimant within ninety (90) days files either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition for Tax Appeals Hearing with the Division of Tax Appeals. The enclosed form TA-9.1 explains this procedure."

The letter was signed by an employee of the Department of Taxation and Finance.

Form TA-9.1 states, in part, that the request must be filed within a certain time period from the date notice of the Division's action was mailed. The form adds that reference to the notice received will assist in determining the time limit. The form further states that the time limits are established by law and cannot be extended and recommends that certified or registered mail be used.

On June 29, 1992, the Bureau of Conciliation and Mediation Services received petitioner's Request for Conciliation Conference, which indicates it was signed on April 7, 1992. Attached to the request was a power of attorney in which petitioner, showing an address

of "c/o Marks Shron and Company, 111 Great Neck Road, Great Neck, New York 11021", appointed Arnold A. Gruber and Thomas H. Zick, of the same address, to represent it in a refund claim matter. The power of attorney is dated April 7, 1992. Also attached is the second page of the Division's denial letter of March 18, 1992. The copy of the envelope which contained the request bears a United States Postal Service postmark of June 24, 1992.

The Bureau of Conciliation and Mediation Services issued, on August 21, 1992, a Conciliation Order Dismissing Request. The order stated that:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on March 18, 1992, but the request was not mailed until June 24, 1992, or in excess of 90 days, the request is late filed."

Petitioner's attorney, Gordon I. Remer, Esq., testified that it is his normal office practice to note on the client's files each action taken. According to Mr. Remer's testimony, petitioner's file contains a notation that the request for conciliation services was placed in his office's outgoing mail box on May 14, 1992, as was the usual practice in his office. A copy of the power of attorney which accompanied the request contains the following notation in the upper right hand corner: "Mailed 5/14/92 to Conciliation Bureau."

During the course of the hearing, the parties entered into two related stipulations of fact which concerned situations involving the comparison of the dates of letters to the dates on the envelopes in which they were mailed. The situations were as follows:

(a) A letter from the Division's Law Bureau was dated August 26, 1993, while the envelope in which it was mailed contained a machine-metered stamp of August 30, 1993; and

(b) A letter from the Division's Transaction & Transfer Tax Bureau was dated August 9, 1993, while the envelope in which it was mailed contained a machine-metered stamp of August 11, 1993.

In support of its position, the Division introduced an affidavit of George Gaffney, a Tax Technician II employed in the Real Property Transfer Gains Tax Unit of the Division. As part of his regular duties, Mr. Gaffney supervised the clerical staff of the Processing Section within

his unit with respect to the generation and issuance of notices of determination denying refund claims to taxpayers. Mr. Gaffney explained that when a determination had been made that a claim for refund of real property transfer gains tax was to be denied, the Gains Tax Unit would prepare a written notice of determination denying the application for refund. In the present matter, the written notice of determination is the March 18, 1992 letter denying the refund claim. Mr. Gaffney further explained that it is the procedure of the Division to bring the completed notice of determination to the clerical staff of the Gains Tax Unit for mailing; that the clerical staff prepares an envelope for mailing the notice and then places the notice inside the envelope; that the proper certified mail documentation, including Postal Service Form 3877 (firm registration book) and Postal Service Form 3811 (domestic return receipt), is prepared; that the clerical staff of the Gains Tax Unit makes three copies of the form and attaches those copies to the envelope containing the notice of determination; and that the envelope and the attached Postal Service Form 3877's are delivered to the registry unit of the Division's mailroom located at Building 8, W. A. Harriman Campus, Albany, New York. It is at the registry unit that metered postage is affixed to the envelope containing the notice of determination.

Following delivery of the notice to the mailroom and the affixing of the postage to the envelope, Mr. Gaffney explained that the envelope containing the notice of determination and the completed Postal Service Forms 3877 and 3811 were delivered by a mailroom employee to an office of the United States Postal Service. An employee of the Postal Service reviews the Postal Service Form 3877 to verify that the mail pieces listed on such form were, in fact, received. The Postal Service employee then stamps the Form 3877, indicating the date of mailing. Approximately once a month, batches of Postal Service Form 3877's are returned by employees of the Division's mailroom to the Gains Tax Unit. The Gains Tax Unit then stores the forms in the usual course of its business.

Attached to the Gaffney affidavit was a Postal Form 3877 listing one item with the number P150016 413 appearing next to the same address as that which appears on the notice of

determination.<sup>1</sup> At the top of the form is handwritten "Gains Tax" and "3/18/92". The form contains a U.S. Postal Service postmark of March 18, 1992. The signature boxes for the

"Postmaster, Per (Name of receiving employee)" is blank; the box indicating the total number of pieces of mail listed by the sender, i.e., the Division, is blank; the box indicating the total number of pieces received at the post office is blank; the check box indicating the type of mail service desired, i.e., "Registered", "Insured", "COD", "Certified" or "Express", is not filled in; and the box indicating whether the sender wants or does not want postal insurance is not checked.

Also attached to the affidavit is a Postal Service Form 3811 containing the same article number (P150016 413) and address (Arnold A. Gruber, c/o Marks, Shron & Company, 111 Great Neck Road, Great Neck, New York 11021) as appears on the notice of determination. The Postal Form 3811 also indicates that the article was signed for and delivered on March 26, 1992. Delivery on March 26, 1992 to the address indicated was admitted by petitioner.

In paragraphs 6 and 8 of his affidavit, Mr. Gaffney concluded, based upon his review of the notice of determination, Postal Forms 3877 and 3811 and his personal knowledge of the operations and procedures of the Processing Section of the Gains Tax Unit, that the notice of determination dated March 18, 1992, which denied petitioner's claim for refund, was delivered to the U.S. Postal Service on March 18, 1992 and received by the addressee on March 26, 1992.

#### CONCLUSIONS OF LAW

A. Tax Law § 1445(2) provides that the Commissioner of Taxation and Finance may grant or deny an application for a claim for refund of real property transfer gains tax paid and shall notify the taxpayer by mail of the decision. Section 1445(2) further provides that:

"Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing."

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<sup>1</sup>The address shown on Postal Form 3877 is the same as that which appears on the notice of determination except that it omits the State and zip code.

As an alternative to proceeding directly to a formal hearing, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services ("BCMS") (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the determination, in this case 90 days (Tax Law §§ 170[3-a][a]; 1445[2]; see, 20 NYCRR 4000.3[c]).

The law provides that the Division shall notify the taxpayer of its determination by mail accordingly, and the 90-day period in which to protest the notice begins to run from the date of mailing of the notice (Tax Law § 1445[2]). A notice is mailed when it is delivered to the custody of the United States Postal Service for mailing (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

B. Petitioner initially claims that the Division did not properly issue a notice of determination because the Commissioner of Taxation and Finance did not sign the March 18, 1992 notice as required by Tax Law § 1445.2; because the March 18, 1992 letter was not mailed to petitioner as required by Tax Law § 1445.2; and because the March 18, 1992 letter did not meet the requirements of a notice of determination.

Tax Law § 2(1) provides:

"Unless otherwise expressly stated or unless the context or subject matter otherwise requires, 'tax department' or 'department', as used in this chapter, means the department of taxation and finance, 'commissioner' means the commissioner of taxation and finance or his delegate, and 'tax commission' or 'commission', in all matters pertaining to the administration of the division of tax appeals, means the tax appeals tribunal and in all other matters means the commissioner of taxation and finance" (emphasis added).

The Commissioner is not required to sign each and every piece of correspondence that emanates from the Division but may delegate his authority to Division employees. The individual who signed the March 18, 1992 letter denying the claim for refund here is a delegate of the Commissioner of Taxation and Finance and as such properly signed the letter.

The notice of determination was mailed to "Arnold A. Gruber, c/o Marks Shron & Company, 111 Great Neck Road, Great Neck, New York 11021" because the claim for refund

indicated that this was the address of the claimant filing for the refund. In addition, Mr. Gruber was the "person to contact" as shown on the claim for refund. It was not only appropriate for the Division to use such address, but the use of any other address would have been inappropriate, as petitioner indicated this to be its own address on the refund claim form.

Petitioner claims that the March 18, 1992 letter does not constitute a notice of determination because it failed to provide petitioner notice of when the 90-day period commenced. The letter states that the determination of denial shall be final and irrevocable unless claimant requests a hearing or conference within 90 days, as provided by Tax Law § 1445.2. Section 1445.2 states that the "mailing of notice of such determination triggers the 90 days." The letter also states that an enclosed Form TA-9.1 explains the procedure for protesting the denial of a refund claim. Such form states that the request or petition must be filed within a certain period (90 days) "from the date the Department mailed you notice of its action." The March 18, 1992 letter, the attached Form TA-9.1 and Tax Law § 1445.2 referenced in the letter provide ample notification of when the 90-day period commences.

C. When the timeliness of a filed petition is at issue, the burden is on the Division to demonstrate proper mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*; *see also*, Cataldo v. Commissioner, 60 TC 522). The Division may prove the mailing by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*; *see also*, Cataldo v. Commissioner, *supra*).

A properly completed Postal Service Form 3877 represents direct documentary evidence of the date and the fact of mailing (*see*, Coleman v. Commissioner, 94 TC 82; Wheat v. Commissioner, 63 TCM 2955; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). Moreover, exact compliance with the Form 3877 procedures reflects compliance with the Division's own procedures and raises a presumption of official regularity in favor of the Division (*see*, Wheat v. Commissioner, *supra*).

A failure to comply precisely with the Form 3877 mailing procedure may not be fatal if the evidence is otherwise sufficient to prove mailing (see, Coleman v. Commissioner, supra; Wheat v. Commissioner, supra). Where the Division relies upon imprecise mailing procedures and other corroborative evidence, the presumption of official regularity does not apply. The crux of the matter is that the Division must introduce evidence showing that the notice of determination was properly delivered to the Postal Service for mailing (see, Coleman v. Commissioner, supra).

D. Upon review of the record herein, it is concluded that the Division has failed to meet its burden to establish proper mailing and the mailing date of the subject notice. While the Division has, by way of the Gaffney affidavit, introduced evidence describing (to some degree) its standard procedures for the creation and mailing of notices of determination, and while the Form 3877 contains a U.S. Postal Service postmark, the circumstances of this case lead to the conclusion that the Division has failed to meet its burden. Initially, it is noted that there is no affidavit which sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and whether those procedures were followed on March 18, 1992. The Form 3877 is incomplete as it lacks any signature or initials by a receiving Postal Service employee; the total number of pieces of mail listed by the sender, i.e., the Division; the total number of pieces received at the post office; and the type of mail service desired, i.e., "Registered", "Insured", "COD", "Certified" or "Express". Such Form 3877 is thus incomplete and the Division is not entitled to any presumption of official regularity with respect thereto (see, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). In the absence of such a presumption, the Division must provide evidence of when the subject notice was in fact delivered to an office of the U.S. Postal Service (id.). The Division has failed to make this showing. The record herein contains no such evidence, e.g., an affidavit from either the mailroom clerk who delivered the notice at issue to the U.S. Postal Service or the postal worker who actually received it. Furthermore, the Division has failed to provide any evidence tying the particular notice at issue to the respective mailing documents. In this regard,



the only identifying number, being the "number of article" (presumably the certified mail number) on the forms 3877 and 3811, does not appear on the notice in question. Hence, the forms 3877 and 3811 at best only support a claim that the Division appears to have mailed something to petitioner on the date claimed (i.e., 3/18/92); the forms 3877 and 3811 are, however, completely insufficient to establish what was mailed on such date.

In accordance with the foregoing discussion, it must be concluded that the Division has presented insufficient evidence to show that the subject notice was mailed to petitioner on the date alleged. Ordinarily, in a case where the Division cannot prove the date of mailing, the conciliation conference request is deemed timely (Matter of Novar TV & Air Conditioner Sales & Serv., supra). However, petitioner has admitted to having actually received the notice on March 26, 1992, and thus the 90-day limitations period begins to run upon such date. In turn, since June 24, 1992 falls within 90 days of March 26, 1992, the request for conciliation conference was timely filed (Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992), and petitioner is entitled to proceed to conference on the subject notice.

E. The petition of Sy Associates is granted to the extent that the request for conciliation conference is deemed timely filed. This matter is remanded to the Bureau of Conciliation and Mediation Services for the scheduling of a conciliation conference.

DATED: Troy, New York  
July 14, 1994

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE